



FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 73 and 74

[MB Docket No. 15-146, GN Docket No. 12-268; FCC 22-33; FR ID 91601]

Preservation of One Vacant Channel in the UHF Television Band for Use by White Spaces Devices and Wireless Microphones

AGENCY: Federal Communications Commission.

ACTION: Denial of petitions for reconsideration.

SUMMARY: In this document, the Federal Communications Commission (Commission or FCC) adopts an Order on Reconsideration (Order), that denies the Petitions for Reconsideration filed by Sennheiser Electronic Corporation and Shure Incorporated and affirms its conclusions and reasoning to close the vacant channel proceeding. The Commission's Order denies petitioners' requests for reconsideration and reversal of the Commission's 2020 Report and Order, that declined to adopt proposals of a 2015 Notice of Proposed Rulemaking, and affirms closure of the vacant channel proceeding.

DATES: The petitions for reconsideration were denied effective May 11, 2022.

FOR FURTHER INFORMATION CONTACT: For further information, contact Michael Scurato (202-418-2083; Michael.Scurato@fcc.gov).

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document, Order on Reconsideration, MB Docket No. 15-146, GN Docket No. 12-268; FCC 22-35, adopted and released on May 11, 2022. The full text of this document can be accessed online via the Commission's Electronic Comment Filing System (ECFS) at: <https://apps.fcc.gov/ecfs> and is available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat via ECFS and at <https://www.fcc.gov/document/fcc-affirms-closure-vacant-channel-proceeding>. To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to fcc504@fcc.gov or call the Consumer & Governmental Affairs

Bureau at 202-418-0530 (voice), 202-418-0432 (tty). The Commission will not send a Congressional Review Act (CRA) submission to Congress or the Government Accountability Office pursuant to the CRA, 5 U.S.C. 801(a)(1)(A), because no rules are being adopted by the Commission.

Synopsis

In this Order on Reconsideration, the Commission denies the Petitions for Reconsideration filed by Sennheiser Electronic Corporation (Sennheiser) and Shure Incorporated (Shure) (collectively, Petitioners) requesting reconsideration and reversal of a Commission Report and Order, 86 FR 9297 (Feb. 12, 2021), 35 FCC Rcd 14272 (2020) (*Termination Order*) that declined to adopt rules proposed in a 2015 Notice of Proposed Rulemaking, 80 FR 38158 (July 2, 2015), 30 FCC Rcd 6711 (2015) (*2015 NPRM*), to preserve a vacant channel in the television (TV) bands for use by white space devices and wireless microphones and terminated the proceeding.

As the Commission held in the *Termination Order*, it finds that adoption of the rules proposed in the *2015 NPRM* would not strike the most reasonable balance that would best serve the public interest. The Commission makes this determination in light of other actions taken by the Commission since the *2015 NPRM* that will support wireless microphone users and the burdens that the proposal would impose on broadcasters. The Commission also reaffirms the conclusions it reached in the *Termination Order* that the steps the Commission has taken in other proceedings since the *2015 NPRM* provide a better alternative for addressing the needs of wireless microphone providers than through efforts to preserve a vacant channel in light of the burdens the vacant channel proposal would impose on broadcasters. Because it agrees that the totality of these circumstances support the findings in the *Termination Order*, the Commission rejects the Petitioners' claim that its action was arbitrary and capricious.

The Commission recognizes the Petitioners' preference for UHF TV band spectrum to the alternatives adopted to assist the wireless microphone operations, but does not find sufficient

grounds to reconsider the Commission's conclusion not to pursue the *2015 NPRM*. The Commission notes that the *Termination Order* does not find that the other proceedings to support spectrum access for wireless microphones are a perfect substitute for the UHF TV band spectrum. The Commission also notes that its decision not to pursue the *2015 NPRM* did not lessen the spectrum access that wireless microphones currently enjoy in the TV band and indeed the Commission has continued to find ways, and additional spectrum, to accommodate wireless microphones in the future outside of the crowded TV bands. Furthermore, technical issues raised by Petitioners and commenters related to the differences between spectrum in the TV band and other bands have been considered in other dockets, the Commission explains. Moreover, although not necessary to support the Commission's decision to terminate this proceeding, the Commission also notes that it continues to explore these issues in pending proceedings.

In weighing those needs, the Commission further affirms that it reasonably concluded that the 2015 vacant channel proposal would impose undue burdens on the broadcast users of the TV band. The Commission finds that it adequately weighed the needs of all spectrum users, and supported its decision not to pursue the proposals in the *2015 NPRM* for several reasons, including changed circumstances since 2015 and the alternate initiatives taken by the Commission since 2015.

The Commission also agrees with its prior decision that the proposal would impose undue burdens on broadcasters "both in congested areas where a vacant channel may not be available in the television band and in less congested areas where more spectrum is available such that analysis is not warranted." As the National Association of Broadcasters (NAB) and a number of individual broadcasters noted in their 2015 comments, the Commission explains that adoption of the proposed rules would serve to freeze full power stations in place and hamstring their ability to expand or innovate to better serve their viewers. And the proposal would require "novel engineering studies" that "would be expensive and time-consuming, particularly for smaller broadcasters" where "the cost of conducting such studies is likely to be multiples of

current engineering design costs.” Significantly, television stations would bear the administrative burden of studying and proving the availability of channels for other users in order to receive approval of an application that is otherwise grantable in the public interest. The Commission concludes it properly decided “not [to] deviate from previous Commission decisions that use of the TV bands by primary and secondary broadcast users have priority over wireless microphones and white space devices.” Further, although Petitioners’ opine that the adoption of the 2015 proposals would not hinder the development of ATSC 3.0 (the TV transmission standard developed by the Advanced Television Systems Committee) service by broadcasters, including new and innovative uses of broadcast spectrum that the ATSC 3.0 standard enables, the Commission explains that it believes that it properly balanced concerns raised in the record that the proposed rules would hamstring the ability of broadcasters to innovate. Petitioners’ support of a scheme that would forgo the nationwide solution proposed by the Commission and sought by proponents of the *2015 NPRM* would not ameliorate cost and regulatory compliance burdens for licensed broadcasters, the Commission concludes.

The Commission acknowledges Shure’s assertion that the *2015 NPRM* was an integral part of a multi-proceeding effort to support wireless microphones and that it was contemplated that the Incentive Auction would result in changed circumstances. The Commission does not, however, believe these factors mandate reconsideration. As described herein, the Commission continues to balance and support various spectrum users’ needs in multiple proceedings balancing all the facts and circumstances and concludes that the actions taken in other proceedings to make spectrum available for wireless microphones have achieved the balance sought in the *Incentive Auction Report and Order*, 79 FR 48441 (Aug. 15, 2014), 29 FCC Rcd 6567 (2014), while also addressing the needs of licensed broadcast stations displaced by the Incentive Auction. For the same reason, the Commission does not believe that Sennheiser’s insistence that the Commission pursue the *2015 NPRM*’s proposals in addition to the other proceedings supporting wireless microphones mandates reconsideration.

While the focus of the *2015 NPRM* was on a nationwide vacant channel solution, Petitioners contend that a non-nationwide solution would also benefit wireless microphones and thus the inability to achieve a nationwide solution does not justify termination of the proceeding. The Commission disagrees. A non-nationwide vacant channel solution would necessarily provide fewer benefits than the proposal as originally conceived without diminishing any of the burdens on broadcasters, especially in rural areas without adequate multichannel video programming distributor (MVPD) and broadband service alternatives, and if anything would therefore further support the Commission's balance of the needs of the various spectrum users.

The Commission also rejects Shure's unsupported argument that the Commission erred by unanimously adopting the *Termination Order* during the "lame duck" transition period after the national presidential election, which resulted in a change of the party with control over administrative agencies. Shure's argument is unavailing because it lacks any legal support and, in any event, is now moot because the Commission rejects the Petitions on the merits.

Market analyses provided by Shure and Sennheiser purporting to indicate vacant channel availability in major designated market areas (DMAs) does not support reconsideration, according to the Commission. Neither submission alters the Commission's conclusion in the *Termination Order* that TVStudy software reveals that there are numerous major metropolitan areas in the United States that have no vacant, 6 MHz channels. In its petition, Shure describes an "independent preliminary analysis of channel availability" that it conducted using a tool that it developed to "calculate[] vacant channel availability after drawing information from the FCC TV database." Using the tool, Shure compiled a list of channels it claims are vacant in the top 10 DMAs. But the "preliminary analysis" is flawed, the Commission finds. For example, channels listed as available in multiple markets, including the two listed for Houston, two for Dallas, two for Los Angeles, and one for Chicago, do not qualify as vacant channels because they are adjacent to land mobile. Others, including the remaining channels listed for Dallas, Los Angeles, and Chicago also do not qualify as vacant channels because they are identified in LPTV or Class

A construction permits or licenses. Similarly, Sennheiser’s ex parte purportedly “update[d] the Commission on new developments” to offer a data analysis. On the basis of that analysis, it asserts that, with the exception of Phoenix, Arizona, “in almost every major DMA in the United States, there is a vacant channel that could be designated for wireless microphones.” This analysis is also unconvincing, the Commission concludes. First, by identifying Phoenix as a market that lacks a vacant channel, the ex parte concedes that the Commission was correct in its assertion in the *Termination Order* that a *nationwide* vacant channel solution in the TV band as proposed in the *2015 NPRM* is no longer possible. Furthermore, the analysis described in the ex parte is flawed for several reasons, and therefore it does not undermine the assertion in the *Termination Order* that numerous major metropolitan areas have no vacant 6 MHz channels. First, the analysis is inaccurate in stating that certain channels are available. For example, the ex parte assertion that channel 16 in Salt Lake City is available overlooks a displacement construction permit issued for that channel. Second, the analysis incorrectly assumes that the identification of an available channel in a specific location demonstrates that the channel could be preserved across an entire DMA. Again, the example of channel 16 in Salt Lake City is illustrative, as the Salt Lake City DMA includes the entire state of Utah and portions of neighboring states. Within that DMA a number of TV translators occupy channel 16, which would disqualify the channel as vacant throughout the entire DMA. Third, some of the channels that the ex parte identifies as available in large markets, such as New York and Los Angeles, could not be deemed vacant for the purposes of the *2015 NPRM* proposals because those channels have land mobile reservations on adjacent channels. Finally, the ex parte analysis was performed using a third-party tool found on an internet webpage that utilizes standards that are not consistent with Commission rules to protect TV operations from wireless microphones, which in many cases will overstate channel availability as compared to what was proposed in the *2015 NPRM* and is not a reliable method for evaluating the Vacant Channel proposal.

In summary, and consistent with the public interest analysis in the *Termination Order*, while the Commission recognizes the important benefits provided by wireless microphones in the TV bands, it finds that other actions that the Commission has taken to support these users subsequent to issuance of the *2015 NPRM* provide a better alternative for addressing their needs than through efforts to preserve a vacant channel in light of the burdens the vacant channel proposal would impose on broadcasters. The Commission agrees with the conclusion in the *Termination Order* that it can no longer say that the *2015 NPRM*'s proposals "will not significantly burden broadcast applicants." In light of changed circumstances, the Commission concludes that it should not deviate from previous Commission decisions that use of the TV bands by primary and secondary broadcast users have priority over wireless microphones and white space devices. The Commission believes that preserving robust over-the-air broadcast television service remains an important spectrum allocation priority, especially to rural areas without adequate MVPD and broadband service alternatives. The Commission continues to recognize the promise of next generation ATSC 3.0 service by over-the-air television broadcasters to expand the universe of potential uses of broadcast spectrum capacity for new and innovative services in ways that will complement the nation's burgeoning 5G networks and usher in a new wave of innovation and opportunity. Having restructured the TV band, the Commission finds that to now adopt a requirement that primary and/or secondary television stations protect spectrum availability for wireless microphones in the smaller, more densely packed television band, would not serve the public interest. Therefore, the Commission finds that, on balance, seeking to preserve a vacant channel at this time, considering all of the actions that the Commission has taken since 2015 to promote wireless microphones interests, are outweighed by the burdens of the proposals on broadcasters.

The Commission therefore affirms the its decision in the *Termination Order* to decline to adopt the proposals of the *2015 NPRM* and to terminate this docket, and disagrees with Petitioners that the Commission's rejection of the *2015 NPRM* warrants reconsideration.

For the reasons stated above, the Commission denies the Petitions filed by Sennheiser and Shure requesting reconsideration and reversal of the *Termination Order* and declines to adopt rules proposed in the *2015 NPRM* to preserve a vacant channel for use wireless microphones use.

Accordingly, IT IS ORDERED that, pursuant to sections 1, 4(i), 4(j), 303(r), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 303(r), 405 and § 1.429 of the Commission's rules, 47 CFR 1.429, the captioned Petitions for Reconsideration ARE DENIED, for the reasons discussed herein.

IT IS FURTHER ORDERED that, should no petitions for reconsideration or petitions for judicial review be timely filed, MB Docket No. 15-146 SHALL BE TERMINATED and the docket closed.

FEDERAL COMMUNICATIONS COMMISSION

Marlene Dortch,

Secretary.

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